

TOSTRUD LAW GROUP, P.C.
JON A. TOSTRUD
1925 Century Park East
Suite 2100
Los Angeles, CA 90067
Telephone: (310) 278-2600
Facsimile: (310) 278-2640
jtostrud@tostrudlaw.com

[Additional Counsel on Signature Page]

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

WARD ROUSE, Derivatively on) CASE NO.: 18-cv-1348
Behalf of Nominal Defendant EKSO)
BIONICS HOLDINGS, INC.,) **VERIFIED SHAREHOLDER**
) **DERIVATIVE COMPLAINT**
Plaintiff,)

STEVEN SHERMAN, THOMAS)
LOOBY, MARILYN HAMILTON,)
HOWARD PALEFSKY, JACK)
PEURACH, STANLEY STERN,)
THEODORE WANG, and AMY)
WENDELL,)

v.)

Defendants,)

EKSO BIONICS HOLDINGS, INC.,)
a Nevada Corporation,)
)
Nominal Defendant.)

JURY TRIAL DEMANDED

Plaintiff Ward Rouse (“Plaintiff”), on behalf of Ekso Bionics Holdings, Inc.
 (“Ekso” or the “Company”), derivatively, allege the following based upon personal

1 knowledge as to himself and his own acts, and upon information and belief and
2 investigation of counsel as to all other matters. That investigation included, among
3 other things, a thorough review and analysis of public documents, court filings,
4 press releases and news articles concerning Ekso, and the other facts as set forth
5 herein:

6 **NATURE OF THE ACTION**

7 1. This is a shareholder derivative action brought on behalf of and for the
8 benefit of Ekso, against certain of its officers and/or directors named as defendants
9 herein seeking to remedy their breaches of fiduciary duties. Defendants' actions
10 have caused, and will continue to cause, substantial financial harm and reputational
11 damage to Ekso.

12 2. Ekso designs, develops, and sells exoskeletons for use in the
13 healthcare, industrial, military, and consumer markets in North America, Europe,
14 the Middle East, and Africa. The Company operates through Medical Devices,
15 Industrial Sales, and Engineering Services segments. It primarily offers Ekso GT, a
16 bionic suit that provides the ability to stand and walk over ground to individuals
17 with spinal cord injuries, hemiplegia, and lower limb paralysis or weakness.

18 3. Throughout the Relevant Period (March 15, 2017 and December 27,
19 2017), Defendants caused the Company to make materially false and misleading
20 statements regarding the Company's business, operational and compliance policies.
21 Specifically, Defendants caused the Company to make false and/or misleading
22 statements and/or failed to disclose that: (i) the Company had a material weakness
23 in its internal control over financial reporting; (ii) the Company's disclosure
24 controls and procedures were not effective; and (iii) as a result of the foregoing, the
25 Company's public statements were materially false and misleading at all relevant
26 times.

4. On December 14, 2017, Defendants caused the Company to file a Form 8-K with the United States Securities and Exchange Commission (“SEC”) that advised investors that “the Company’s internal control over financial reporting as of December 31, 2016 should no longer be relied upon and that a material weakness in the Company’s internal control over financial reporting existed as of such date.” The Company stated that its announcement was due to a reevaluation of the Company’s information technology (“IT”) controls by OUM & Co. LLP (“OUM”), the Company’s auditor. The Company also stated that it intended “to amend [its] Annual Report on Form 10-K for the fiscal year ended December 31, 2016 and [its] Quarterly Reports on Form 10-Q for the periods ended March 31, 2017, June 30, 2017 and September 30, 2017 to reflect the conclusion by management that there was a material weakness in internal control over financial reporting and that [its] disclosure controls and procedures were not effective as of the end of the periods covered by these reports.”

5. The Company’s stock price dropped \$0.15, or 6.17%, to close at \$2.28 on December 15, 2017 on this news.

6. On December 27, 2017, the Company filed an amended annual report for 2016 and amended quarterly reports for the first three quarters of 2017 on Form 10-Q. The Company’s stock price dropped \$0.34, or over 13%, to close at \$2.23 on December 28, 2017 on this news.

JURISDICTION AND VENUE

7. This Court also has jurisdiction over the claims asserted herein under 28 U.S.C. § 1331 because Plaintiff and Defendants have diverse citizenship.

8. The Court has jurisdiction over each defendant because each defendant is either a corporation that does sufficient business in California or is an individual who has sufficient minimum contacts with California so as to render the

1 exercise of jurisdiction by the California courts permissible under traditional
 2 notions of fair play and substantial justice.

3 9. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because
 4 one or more of the Defendants either resides in or maintains executive offices in
 5 this District, including Nominal Defendant Ekso, a substantial portion of the
 6 transactions and wrongs complained of herein – including Defendants’ primary
 7 participation in the wrongful acts detailed herein and aiding and abetting in
 8 violations of fiduciary duties owed to Ekso – occurred in this District, and
 9 Defendants have received substantial compensation in this District by doing
 10 business here and engaging in numerous activities that had an effect in this District.

11 10. In connection with the acts and conduct alleged herein, Defendants,
 12 directly and indirectly, used the means and instrumentalities of interstate
 13 commerce, including, but not limited to, the United States mails, interstate
 14 telephone communications, and the facilities of the national securities exchanges
 15 and markets.

16 **PARTIES**

17 **Plaintiff**

18 11. *Plaintiff Ward Rouse* is a citizen of the State of Iowa and a current
 19 Ekso shareholder during the Relevant Period. Plaintiff will continue to hold Ekso
 20 shares throughout the pendency of this action. Plaintiff will fairly and adequately
 21 represent the interests of the shareholders in enforcing the rights of the corporation.

22 **Nominal Defendant**

23 12. *Nominal Defendant Ekso* designs, develops, and sells exoskeletons
 24 for use in the healthcare, industrial, military, and consumer markets in North
 25 America, Europe, the Middle East, and Africa. The Company operates through
 26 Medical Devices, Industrial Sales, and Engineering Services segments.

27 **Director Defendants**

1 13. ***Defendant Steven Sherman*** (“Sherman”) has served on the Board
2 of Directors (the “Board”) of the Company since December 2013. Defendant
3 Sherman is the Chairman of the Audit Committee and is a member of the
4 Nominating and Governance Committee. Defendant Sherman is, upon
5 information and belief, a citizen of the State of Connecticut.

6 14. ***Defendant Tom Looby*** (“Looby”) is President and Chief Executive
7 Officer (“CEO”) of the Company. Defendant Looby is also a Director of the
8 Company. Defendant Looby is, upon information and belief, a citizen of the
9 State of California.

10 15. ***Defendant Marilyn Hamilton*** (“Hamilton”) has served on the Board
11 of the Company since January 2012. Defendant Hamilton is a member of the
12 Compensation Committee. Defendant Hamilton is, upon information and belief, a
13 citizen of the State of California.

14 16. ***Defendant Howard Palefsky*** (“Palefsky”) serves on the Board of the
15 Company. Defendant Palefsky is a member of the Nominating and Governance
16 Committee. Defendant Palefsky is, upon information and belief, a citizen of the
17 State of Georgia.

18 17. ***Defendant Jack Peurach*** (“Peurach”) has served on the Board of the
19 Company since January 2012. Defendant Peurach is a member of the Nominating
20 and Governance Committee and a member of the Audit Committee. Defendant
21 Peurach is, upon information and belief, a citizen of the State of California.

22 18. ***Defendant Stanley Stern*** (“Stern”) served on the Board of the
23 Company during the Relevant Period. Defendant Stern is a member of the Audit
24 Committee. Defendant Stern is, upon information and belief, a citizen of the State
25 of New York.

26 19. ***Defendant Amy Wendell*** (“Wendell”) served on the Board of the
27 Company during the Relevant Period. Defendant Wendell is a member of the
28

1 Compensation Committee. Defendant Wendell is, upon information and belief, a
2 citizen of the State of Massachusetts.

3 20. ***Defendant Ted Wang*** (“Wang”) served on the Board of the Company
4 during the Relevant Period. Defendant Wang is a member of the Nominating and
5 Governance Committee. Defendant Wang is, upon information and belief, a citizen
6 of the State of New York.

7 **Audit Committee Charter**

8 21. Pursuant to the Company’s Audit Committee Charter, the purpose of
9 the Audit Committee is to assist the Board with oversight of the Company’s
10 accounting and financial reporting processes and the audit of the Company’s
11 financial statements.

12 22. The Audit Committee Charter states in relevant part:

13 The Audit Committee shall discharge its responsibilities,
14 and shall assess the information provided by the
15 Company’s management and the Company’s registered
16 public accounting firm (the “independent auditor”), in
17 accordance with its business judgment. Management is
18 responsible for the preparation, presentation, and integrity
19 of the Company’s financial statements, for the
20 appropriateness of the accounting principles and reporting
21 policies that are used by the Company and for establishing
22 and maintaining adequate internal control over financial
23 reporting. The Audit Committee shall review the
24 Company’s compliance with applicable laws and
25 regulations and review and oversee any policies,
26 procedures and programs designed to promote such
27 compliance. The independent auditor is responsible for
28 auditing the Company’s financial statements and the
Company’s internal control over financial reporting and
for reviewing the Company’s unaudited interim financial
statements. The authority and responsibilities set forth in
this Charter do not reflect or create any duty or obligation
of the Audit Committee to plan or conduct any audit, to
determine or certify that the Company’s financial

statements are complete, accurate, fairly presented, or in accordance with generally accepted accounting principles or applicable law, or to guarantee the independent auditor's reports.

* * *

Oversight. The Audit Committee shall coordinate the Board's oversight of the Company's internal control over financial reporting, disclosure controls and procedures and code of conduct. The Audit Committee shall receive and review the independent auditor's report on the effectiveness of the Company's internal control over financial reporting and the reports of the principal executive officer and the principal financial officer required by Rule 13a-14 under the Exchange Act.

SUBSTANTIVE ALLEGATIONS

23. On March 15, 2017, Defendants caused the Company to file an annual report on Form 10-K with the SEC. It was in this Form 10-K that the Company announced its financial and operating results for the quarter and year ended December 31, 2016 ("2016 Form 10-K"). The 2016 Form 10-K stated in relevant part:

The Company's management assessed the effectiveness of the Company's internal control over financial reporting as of December 31, 2016 based on the criteria set forth by the Committee of Sponsoring Organizations of the Treadway Commission in Internal Control—Integrated Framework (2013). The Company's management believes that based on this criteria, as of December 31, 2016, the Company's internal control over financial reporting is effective. The effectiveness of our internal control over financial reporting as of December 31, 2016 has been audited by OUM LLP, an independent registered public accounting firm, as stated in their report, which appears under Item 8 of this Annual Report on Form 10-K.

Changes in Internal Control Over Financial Reporting:

1 There were no changes in our internal control over
 2 financial reporting identified in connection with the
 3 evaluation required by (d) of Exchange Act Rules 13a-15
 4 or 15d-15 that occurred during our fourth quarter that have
 materially affected, or are reasonably likely to materially
 affect, our internal control over financial reporting.

5 24. In the 2016 Form 10-K, the Company included a Report of
 6 Independent Registered Public Accounting Firm, signed by OUM, stating that
 7 “Ekso . . . maintained, in all material respects effective internal control over
 8 financial reporting as of December 31, 2016.”

9 25. The 2016 Form 10-K also contained signed certifications pursuant to
 10 the Sarbanes-Oxley Act of 2002 (“SOX”), stating that “the information contained
 11 in the [2016 Form 10-K] fairly presents, in all material respects, the financial
 12 condition and results of operations of the Company at the dates and for the periods
 13 indicated.”

14 26. On May 9, 2017, Defendants caused the Company to file a quarterly
 15 report on Form 10-Q with the SEC. It was in this Form 10-Q that the Company
 16 announced its financial and operating results for the quarter ended March 31, 2017
 17 (“Q1 2017 Form 10-Q”). The Q1 2017 Form 10-Q stated in relevant part:

18 *Changes in Internal Control Over Financial Reporting*

19 There were no changes in our internal control over
 20 financial reporting that occurred during the most recent
 21 fiscal quarter that have materially affected, or are
 22 reasonably likely to materially affect, our internal control
 over financial reporting.

23 27. The Q1 2017 Form 10-Q contained signed certifications pursuant to
 24 SOX, stating that “the information contained in the [Q1 2017 Form 10-Q] fairly
 25 presents, in all material respects, the financial condition and results of operations of
 26 the Company at the dates and for the periods indicated.”
 27

1 28. On August 7, 2017, Defendants caused the Company to file a
2 quarterly report on Form 10-Q with the SEC. It was in this Form 10-Q that the
3 Company announced its financial and operating results for the quarter ended June
4 30, 2017 (the “Q2 2017 Form 10-Q”). In the Q2 2017 Form 10-Q, the Company
5 stated in relevant part:

6 *Changes in Internal Control Over Financial Reporting*

7
8 There were no changes in our internal control over
9 financial reporting that occurred during the most recent
10 fiscal quarter that have materially affected, or are
reasonably likely to materially affect, our internal control
over financial reporting.

11 29. The Q2 2017 Form 10-Q contained signed certifications pursuant to
12 SOX, stating that “the information contained in the [Q2 2017 Form 10-Q] fairly
13 presents, in all material respects, the financial condition and results of operations of
14 the Company at the dates and for the periods indicated.”

15 30. On November 8, 2017, Defendants caused the Company to file a
16 quarterly report on Form 10-Q with the SEC. It was in this Form 10-Q that the
17 Company announced its financial and operating results for the quarter ended
18 September 30, 2017 (the “Q3 2017 Form 10-Q”). In the Q3 2017 Form 10-Q, the
19 Company stated in relevant part:

20 *Changes in Internal Control Over Financial Reporting*

21
22 There were no changes in our internal control over
23 financial reporting that occurred during the most recent
24 fiscal quarter that have materially affected, or are
reasonably likely to materially affect, our internal control
over financial reporting.

25
26 31. The Q3 2017 Form 10-Q contained signed certifications pursuant to
27 SOX, stating that “the information contained in the [Q3 2017 Form 10-Q] fairly
28

1 presents, in all material respects, the financial condition and results of operations of
2 the Company at the dates and for the periods indicated.”

3 32. The statements referenced above were materially false and/or
4 misleading because they misrepresented and/or failed to disclose the following
5 adverse facts pertaining to the Company’s business, operational and financial
6 results, which were known to Defendants or recklessly disregarded by them.
7 Specifically, Defendants made false and/or misleading statements and/or failed to
8 disclose that: (i) the Company had a material weakness in its internal control over
9 financial reporting; (ii) the Company’s disclosure controls and procedures were not
10 effective; and (iii) as a result of the foregoing, the Company’s public statements
11 were materially false and misleading at all relevant times.

12 **THE TRUTH EMERGES**

13 33. On December 14, 2017, Defendants caused the Company to file a
14 Form 8-K with the SEC. The Form 8-k stated in relevant part: “that the Company’s
15 internal control over financial reporting was not effective at December 31, 2016
16 and, accordingly, its disclosure controls and procedures were not effective at
17 December 31, 2016 or for subsequent interim periods.” The Form 8-K further
18 stated:

19 On December 8, 2017, OUM & Co. LLP (“OUM”)
20 notified Ekso Bionics Holdings, Inc. (the “Company”) that
21 it had concluded that its report on the effectiveness of the
22 Company’s internal control over financial reporting as of
23 December 31, 2016 should no longer be relied upon and
24 that a material weakness in the Company’s internal control
25 over financial reporting existed as of such date. This
26 material weakness has not resulted in a restatement of the
27 Company’s consolidated financial statements or footnote
28 disclosures for any periods through and including the fiscal
year ended December 31, 2016.

27 * * *

1 As part of its original audit of the Company's financial
2 statements included in the 2016 10-K, OUM assessed the
3 Company's internal control over financial reporting as of
4 December 31, 2016. At that time, OUM and the Company
5 concluded that the Company maintained effective internal
6 control over financial reporting as of December 31, 2016.
7 Subsequent to the issuance of the 2016 10-K, the Public
8 Company Accounting Oversight Board conducted an
9 inspection of OUM's 2016 audit of the Company. As a
10 result, OUM reevaluated the Company's information
11 technology (IT) general controls and has now concluded
12 that a "material weakness" existed as of December 31,
13 2016.

14 As a result of the identified material weakness, OUM has
15 performed additional testing on the Company's financial
16 statements as of and for the year ended December 31, 2016
17 to reconfirm their opinion on the fairness of the financial
18 statements included in the 2016 10-K without reliance on
19 the effectiveness of the Company's internal controls. As
20 noted above, OUM has now reconfirmed its unqualified
21 opinion on the fairness of the Company's financial
22 statements included in the 2016 10-K.

23 After consultation with OUM, management has now
24 concluded that the Company's internal control over
25 financial reporting was not effective at December 31, 2016
26 and, accordingly, its disclosure controls and procedures
27 were not effective at December 31, 2016 or for subsequent
28 interim periods

29 We plan to amend our Annual Report on Form 10-K for
30 the fiscal year ended December 31, 2016 and our Quarterly
31 Reports on Form 10-Q for the periods ended March 31,
32 2017, June 30, 2017 and September 30, 2017 to reflect the
33 conclusion by management that there was a material
34 weakness in internal control over financial reporting and
35 that our disclosure controls and procedures were not
36 effective as of the end of the periods covered by these
37 reports. OUM's auditor's report on the Company's internal
38 control over financial reporting will also be revised to state

1 that the Company's internal control over financial
2 reporting at December 31, 2016 was not effective.

3 34. The Company's stock price dropped \$0.15, or 6.17%, to close at \$2.28
4 on December 15, 2017.

5 35. On December 27, 2017, the Company filed an amended annual report
6 for 2016 and amended quarterly reports for the first three quarters of 2017 on Form
7 10-Q.

8 36. The Company's stock price dropped \$0.34, or over 13%, to close at
9 \$2.23 on December 28, 2017.

10 **DUTIES OF DEFENDANTS**

11 37. By reason of their positions as officers, directors, and/or fiduciaries
12 of Ekso and because of their ability to control the business and corporate affairs
13 of Ekso, Defendants owed the Company and its shareholders fiduciary
14 obligations of trust, loyalty, good faith and due care, and were and are required to
15 use their utmost ability to control and manage Ekso in a fair, just, honest, and
16 equitable manner. Defendants were and are required to act in furtherance of the
17 best interests of Ekso and its shareholders so as to benefit all shareholders
18 equally, and not in furtherance of their personal interest or benefit.

19 38. Each director and officer of the Company owes to Ekso and its
20 shareholders the fiduciary duty to exercise good faith and diligence in the
21 administration of the affairs of the Company and in the use and preservation of its
22 property and assets, as well as the highest obligations of fair dealing. In addition,
23 as officers and/or directors of a publicly held company, Defendants had a duty to
24 promptly disseminate accurate and truthful information with regard to the
25 Company's operations, finances, financial condition, and present and future
26 business prospects so that the market price of the Company's stock would be
27 based on truthful and accurate information.

1 39. Defendants, because of their positions of control and authority as
2 directors and/or officers of Ekso, were able to and did, directly and/or indirectly,
3 exercise control over the wrongful acts complained of herein, as well as the
4 contents of the various public statements issued by the Company. Because of
5 their advisory, executive, managerial and directorial positions with Ekso, each of
6 the Defendants had access to adverse non-public information about the financial
7 condition, operations, sales and marketing practices, and improper
8 representations of Ekso.

9 40. To discharge their duties, the officers and directors of Ekso were
10 required to exercise reasonable and prudent supervision over the management,
11 policies, practices, and controls of the financial affairs of the Company. By
12 virtue of such duties, the officers and directors of Ekso were required to, among
13 other things:

14 a) ensure that the Company complied with its legal obligations
15 and requirements, including acting only within the scope of its legal authority and
16 disseminating truthful and accurate statements to the investing public;

17 b) conduct the affairs of the Company in an efficient, business-
18 like manner so as to make it possible to provide the highest quality performance
19 of its business, to avoid wasting the Company's assets, and to maximize the value
20 of the Company's stock;

21 c) properly and accurately guide investors and analysts as to the
22 true financial condition of the Company at any given time, including making
23 accurate statements about the Company's business prospects, and ensuring that
24 the Company maintained an adequate system of financial controls such that the
25 Company's financial reporting would be true and accurate at all times;

26 d) remain informed as to how Ekso conducted its operations,
27 and, upon receipt of notice or information of imprudent or unsound conditions or
28

1 practices, make reasonable inquiry in connection therewith, take steps to correct
2 such conditions or practices and make such disclosures as necessary to comply
3 with federal and state securities laws; and

4 e) ensure that the Company was operated in a diligent, honest
5 and prudent manner in compliance with all applicable federal, state and local
6 laws, rules and regulations;

7 41. Each Defendant, by virtue of his position as a director and/or officer,
8 owed to the Company and to its shareholders the fiduciary duties of loyalty, good
9 faith, and the exercise of due care and diligence in the management and
10 administration of the affairs of the Company, as well as in the use and
11 preservation of its property and assets. The conduct of Defendants complained of
12 herein involves a knowing and culpable violation of their obligations as directors
13 and officers of Ekso, the absence of good faith on their part, and a reckless
14 disregard for their duties to the Company and its shareholders that Defendants
15 were aware or should have been aware posed a risk of serious injury to the
16 Company.

17 42. Each director and officer of the Company owed to Ekso the fiduciary
18 duty to exercise due care and diligence in the administration of the affairs of the
19 Company and in the use and preservation of its property and assets, and the highest
20 obligations of good faith and fair dealing. In addition, as officers and/or directors
21 of a publicly held company, Defendants had a duty not to advance their own
22 personal, financial, or economic interests over, and at the expense of, the
23 Company's public shareholders, or to allow other Ekso directors, officers, and/or
24 employees to do so. Each director and officer of the Company also owed Ekso and
25 its shareholder-owners the duty to maintain the Company's confidential
26 information and prevent others from misappropriating and/or trading while in
27 possession of the Company's proprietary, confidential information.

43. Defendants breached their duties of loyalty and good faith by causing the Company to misrepresent the information as detailed *infra*. Defendants' subjected the Company to the costs of defending and the potential liability from a class action lawsuit for violations of the federal securities laws. As a result, Ekso has expended, and will continue to expend, significant sums of money.

44. Defendants' actions have irreparably damaged Ekso's corporate image and goodwill.

DEMAND FUTILITY ALLEGATIONS FOR THE BOARD OF EKSO

45. Plaintiff will adequately and fairly represent the interests of Ekso and its shareholders in enforcing and prosecuting its rights.

46. Plaintiff brings this action derivatively in the right and for the benefit of Ekso to redress injuries suffered and to be suffered by Ekso because of the breaches of fiduciary duty by Defendants.

47. Because of the facts set forth herein, Plaintiff has not made a demand on the Board of Ekso to institute this action against Defendants. Such demand would be a futile and useless act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action.

48. The Ekso Board is currently comprised of Sherman, Lobby, Hamilton, Palefsky, Peurach, Stern, Wang and Wendell. Thus, Plaintiff is required to show that a majority of Defendants, *i.e.*, *four* (4), cannot exercise independent objective judgment about whether to bring this action or whether to vigorously prosecute this action.

49. Defendants face a substantial likelihood of liability in this action because they caused Ekso to issue false and misleading statements concerning the information described herein. Because of their advisory, executive, managerial, and directorial positions with Ekso, Defendants had knowledge of material non-

1 public information regarding the Company and was directly involved in the
2 operations of the Company at the highest levels.

3 50. Defendants either knew or should have known of the false and
4 misleading statements that were issued on the Company's behalf and took no steps
5 in a good faith effort to prevent or remedy that situation, proximately causing
6 millions of dollars of losses for Ekso shareholders.

7 51. Defendants (or at the very least a majority of them) cannot exercise
8 independent objective judgment about whether to bring this action or whether to
9 vigorously prosecute this action. For the reasons that follow, and for reasons
10 detailed elsewhere in this Complaint, Plaintiff has not made (and is excused from
11 making) a pre-filing demand on the Board to initiate this action because making a
12 demand would be a futile and useless act.

13 52. Any suit by the Board to remedy these wrongs would likely expose
14 the Company to further violations of the securities laws that would result in civil
15 actions being filed; thus, the Board members are hopelessly conflicted in making
16 any supposedly independent determination about whether to sue themselves.

17 53. Defendants approved and/or permitted the wrongs alleged herein to
18 have occurred and participated in efforts to conceal or disguise those wrongs from
19 the Company's stockholders or recklessly and/or with gross negligence disregarded
20 the wrongs complained of herein and are therefore not disinterested parties.

21 54. Defendants authorized and/or permitted the Company to make false
22 statements that disseminated directly to the public and made available and
23 distributed to shareholders, authorized and/or permitted the issuance of various
24 false and misleading statements, and are principal beneficiaries of the wrongdoing
25 alleged herein, and thus, could not fairly and fully prosecute such a suit even if they
26 instituted it.

27 **DEFENDANTS ARE NOT INDEPENDENT**

Defendant Looby

55. Defendant Looby is President and CEO of the Company. Defendant Looby is also a Director of the Company.

56. Defendant Looby is not disinterested or independent, and therefore, is incapable of considering demand because Looby (as CEO) is an employee of the Company who derived substantially all of his income from his employment with Ekso, making him not independent. As such, Looby cannot independently consider any demand to sue himself for breaching his fiduciary duties to the Company, because that would expose him to liability and threaten his livelihood.

57. Defendant Looby is also a named Defendant in the instant action and in the securities class action entitled *Steven G. Cheehy v. Ekso Bionics Holdings, Inc., et al.*, Case 3:18-cv-00212 (N.D. Cal.) (“Securities Class Action”).

58. This lack of independence and financial benefits received by Defendant Looby renders him incapable of impartially considering a demand to commence and vigorously prosecute this action.

Defendant Wang

59. Defendant Wang is not disinterested or independent, and therefore, is incapable of considering demand because Wang owns 20,543,898 shares of the Company stock or 34.3 % of all the outstanding shares.

60. Puissance Cross-Border Opportunities II LLC also owns 34.3 % of all the outstanding shares of the Company. Puissance Capital Fund (GP) LLC serves as the general partner of Puissance Cross-Border Opportunities II LLC. Puissance Capital Management LP serves as the investment manager of Puissance Cross-Border Opportunities II LLC. Puissance Capital Management (GP) serves as the general partner to Puissance Capital Management LP. Defendant Wang is the managing member of the general partners and may be deemed to have voting and investment power over these shares.

61. Because of Defendant Wang's large stake in Ekso and for other reasons as alleged herein, Wang is not independent and cannot and should not be tasked and trusted to determine the independence of himself and the other directors. As a major shareholder, particularly one owning a substantial portion of the Company's stock, Defendant Wang had control of the selection of the other directors. The fact of Wang's position as an overwhelmingly dominant shareholder is sufficient to support a conclusion that Defendant Wang dominates the Board, whoever its members might be, and therefore that a demand on those directors to sue the stockholder that put them in their positions would be futile.

Defendant Sherman

62. Defendant Sherman is the Chairman of the Audit Committee.

63. Pursuant to the Company's Audit Committee Charter, the members of the Audit Committee are responsible for, *inter alia*, overseeing the accounting and financial reporting processes of the Company and the audits of the financial statements of the Company. Specifically, as a member of the Audit Committee, Defendant Sherman was tasked with reviewing the Company's compliance with applicable laws and regulations and reviewing and overseeing any policies, procedures and programs designed to promote such compliance.

64. Defendant Sherman breached his fiduciary duties of due care, loyalty, and good faith, because as a member of the Audit Committee, *inter alia*, he allowed or permitted false and misleading statements to be disseminated in the Company's SEC filings and other disclosures and, otherwise, failed to ensure that adequate internal controls were in place regarding the serious accounting issues and deficiencies described above. Therefore, Defendant Sherman faces a substantial likelihood of liability for his breach of fiduciary duties and any demand upon him is futile.

65. Further, Defendant Sherman derived a substantial amount of his income from his Board membership (\$142,727 in 2016), making him not independent. As such, Defendant Sherman cannot independently consider any demand to sue himself for breaching his fiduciary duties to the Company, because that would expose him to liability and threaten his livelihood.

Defendant Peurach

66. Defendant Peurach is a member of the Audit Committee.

67. Pursuant to the Company's Audit Committee Charter, the members of the Audit Committee are responsible for, *inter alia*, overseeing the accounting and financial reporting processes of the Company and the audits of the financial statements of the Company. Specifically, as a member of the Audit Committee, Defendant Sherman was tasked with reviewing the Company's compliance with applicable laws and regulations and reviewing and overseeing any policies, procedures and programs designed to promote such compliance.

68. Defendant Peurach breached his fiduciary duties of due care, loyalty, and good faith, because as a member of the Audit Committee, *inter alia*, he allowed or permitted false and misleading statements to be disseminated in the Company's SEC filings and other disclosures and, otherwise, failed to ensure that adequate internal controls were in place regarding the serious accounting issues and deficiencies described above. Therefore, Defendant Peurach faces a substantial likelihood of liability for his breach of fiduciary duties and any demand upon him is futile.

Defendant Stern

69. Defendant Stern is a member of the Audit Committee.

70. Pursuant to the Company's Audit Committee Charter, the members of the Audit Committee are responsible for, *inter alia*, overseeing the accounting and financial reporting processes of the Company and the audits of the financial

1 statements of the Company. Specifically, as a member of the Audit Committee,
2 Defendant Sherman was tasked with reviewing the Company's compliance with
3 applicable laws and regulations and reviewing and overseeing any policies,
4 procedures and programs designed to promote such compliance.

5 71. Defendant Stern breached his fiduciary duties of due care, loyalty,
6 and good faith, because as a member of the Audit Committee, *inter alia*, he
7 allowed or permitted false and misleading statements to be disseminated in the
8 Company's SEC filings and other disclosures and, otherwise, failed to ensure that
9 adequate internal controls were in place regarding the serious accounting issues
10 and deficiencies described above. Therefore, Defendant Stern faces a substantial
11 likelihood of liability for his breach of fiduciary duties and any demand upon him
12 is futile.

13 **FIRST CAUSE OF ACTION**

14 **Against Defendants For Breach of Fiduciary Duty**

15 72. Plaintiff incorporates by reference and re-alleges each allegation
16 contained above, as though fully set forth herein.

17 73. Defendants owed and owe Ekso fiduciary obligations. By reason of
18 their fiduciary relationships, Defendants owed and owe Ekso the highest
19 obligation of good faith, fair dealing, loyalty and due care.

20 74. Defendants, and each of them, violated and breached their fiduciary
21 duties of care, loyalty, reasonable inquiry, oversight, good faith and supervision.

22 75. The Relevant Period Defendants had actual or constructive knowledge
23 that they had caused the Company to improperly misrepresent the business
24 prospects of the Company. These actions could not have been a good faith exercise
25 of prudent business judgment to protect and promote the Company's corporate
26 interests.

76. As a direct and proximate result of Defendants' failure to perform their fiduciary obligations, Ekso has sustained significant and actual damages. As a result of the misconduct alleged herein, Defendants are liable to the Company.

77. Plaintiff, on behalf of Ekso, has no adequate remedy at law.

SECOND CAUSE OF ACTION

Against Defendants for Unjust Enrichment

78. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above, as though fully set forth herein.

79. By their wrongful acts and omissions, Defendants were unjustly enriched at the expense of and to the detriment of Ekso in the form of salaries, bonuses, and other forms of compensation.

80. Plaintiff, as a shareholder and representatives of Ekso, seeks restitution from Defendants, and each of them, and seeks an order of this Court disgorging all profits, benefits and other compensation obtained by these Defendants, and each of them, from their wrongful conduct and fiduciary breaches.

THIRD CAUSE OF ACTION

(Against Defendants for Abuse of Control)

81. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above, as though fully set forth herein.

82. Defendants' misconduct alleged herein constituted an abuse of their ability to control and influence the Company, for which they are legally responsible.

83. As a direct and proximate result of Defendants' abuse of control, the Company has sustained significant damages. As a direct and proximate result of

1 Defendants' breaches of their fiduciary obligations of candor, good faith, and
2 loyalty, the Company has sustained and continues to sustain significant damages.

3 84. As a result of the misconduct alleged herein, Defendants are liable to
4 the Company. Plaintiff, on behalf of the Company, has no adequate remedy at
5 law.

6 **FOURTH CAUSE OF ACTION**

7 **(Against Defendants for Waste of Corporate Assets)**

8 85. Plaintiff incorporates by reference and re-alleges each and every
9 allegation set forth above, as though fully set forth herein.

10 86. As a result of the foregoing, and by failing to properly consider the
11 interests of the Company and its public shareholders, Defendants have caused the
12 Company to waste valuable corporate assets by failing to disclose (i) the Company
13 had a material weakness in its internal control over financial reporting; (ii) the
14 Company's disclosure controls and procedures were not effective; and (iii) as a
15 result of the foregoing, the Company's public statements were materially false
16 and misleading at all relevant times.

17 87. As a result of the waste of corporate assets, Defendants are each
18 liable to the Company.

19 88. Plaintiff, on behalf of the Company, has no adequate remedy at law.

20 **PRAYER FOR RELIEF**

21 **WHEREFORE**, Plaintiff pray for relief and judgment as follows:

22 A. Against Defendants in favor of the Company for the amount of
23 damages sustained by the Company as a result of Defendants' breaches of
24 fiduciary duties, unjust enrichment, abuse of control, and waste of corporate
25 assets;

1 B. Awarding to Plaintiff the costs and disbursements of the action,
2 including reasonable attorney's fees, accountants' and experts' fees, costs, and
3 expenses; and

4 C. Granting such other and further relief as the Court deems just and
5 proper.

6 **JURY TRIAL DEMANDED**

7 Plaintiff hereby demands a trial by jury.

8 //

9 //

10
11 DATED: March 1, 2018

12 **TOSTRUD LAW GROUP, P.C.**

13
14 **By:** /s/ Jon A. Tostrud
15 JON A. TOSTRUD
16 1925 Century Park East
17 Suite 2100
Los Angeles, CA 90067
Telephone: (310) 278-2600
Facsimile: (310) 278-2640
Email: jtostrud@tostrudlaw.com

18 **GAINEY McKENNA & EGGLESTON**

19 Thomas J. McKenna
20 Gregory M. Egleston
440 Park Avenue South, 5th Floor
New York, NY 10016
21 Tel: (212) 983-1300
22 Fax: (212) 983-0383
tjmckenna@gme-law.com
egleston@gme-law.com

23
24 *Attorneys for Plaintiff*

VERIFICATION

I, WARD ROUSE, declare that I have reviewed the Verified Shareholder Derivative Complaint (“Complaint”) prepared on behalf of Ekso Bionics Holdings, Inc. and authorize its filing. I have reviewed the allegations made in the Complaint, and to those allegations of which I have personal knowledge, I believe those allegations to be true. As to those allegations of which I do not have personal knowledge, I rely on my counsel and their investigation and for that reason believe them to be true. I further declare that I am a current holder of Ekso Bionics Holdings, Inc. common stock.

Date: February 13, 2018



WARD ROUSE